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IN THE

Supreme Court of the United States

October Term, 1948

No. 368

HILDA OGDEN BRATT; BARBARA ANN BRATT, a Minor, by Her Guardian Ad Litem, Hilda Ogden Bratt; JOAN NANCY BRATT, a Minor, by Her Guardian Ad Litem, Hilda Ogden Bratt, Petitioners,

vs.

WESTERN AIR LINES, INC., a Corporation, Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS, TENTH CIRCUIT, AND BRIEF IN SUPPORT THEREOF

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vs.

WESTERN AIR LINES, INC., a Corporation, Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS, TENTH CIRCUIT, AND BRIEF IN SUPPORT THEREOF

May It Please The Court:

The petition of Hilda Ogden Bratt; Barbara Ann Bratt, a minor, by her guardian ad litem, Hilda Ogden Bratt; Joan Nancy Bratt, a minor, by her guardian ad litem, Hilda Ogden Bratt, respectfully shows to this Honorable Court:

I.

SUMMARY STATEMENT OF MATTER INVOLVED

The above entitled action was instituted in the District Court of the United States for the District of Utah, Central Division, to recover damages on behalf of his widow and children for the wrongful death of Jack Raymond Bratt. Additional actions were instituted against the

same respondent by J. H. Rosell and Christina McRae to recover damages for the wrongful death of the wife of Mr. Rosell and the son of Mrs. McRae in the same accident. By agreement the three actions were consolidated for trial, and on March 26, 1947, the jury returned a verdict in each case in favor of the respondent and against the petitioners (11).

Judgment was immediately entered in favor of the respondent and against the petitioner (12), and after denial of a motion for a new trial in each case (13, 19), the petitioners prosecuted separate appeals from the judgment. The judgment was affirmed by the United States Court of Appeals, Tenth Circuit (487-492).

It was stipulated between the parties that the three appeals might be heard and submitted to the appellate court upon one printed record and upon one set of briefs (24, 25). Therefore, this Court has before it each of the three cases which have been consolidated both for purposes of trial and appeal for the convenience of all concerned.

This petition before the Court arises after the second trial of these actions. The first trial resulted in a verdict returned on May 1, 1945, likewise in favor of the respondent and against the petitioners in each case. After the first trial, motions for a new trial were denied, and the appeals were prosecuted to the United States Court of Appeals, Tenth Circuit, which reversed the decision of the trial court and granted a new trial, principally on the ground that prejudicial error had occurred in the exclusion of evidence. The former appeal will be found reported as *Bratt, et al., v. Western Air Lines, Inc.,* 155 F. (2d) 850. After the decision of the United States Court of Appeals, Tenth Circuit, on the first appeal the respondent applied to the Supreme Court of the United States for certiorari, which was denied in 67 S. Ct. 100.

OPINION OF THE COURT BELOW

The opinion of the United States Court of Appeals, Tenth Circuit, is reported in *Bratt, et al., v. Western Air Lines, Inc.*, 169 F. (2d) 214, affirming the decision of the trial court. It will also be found in the record, page 487, et seq.

STATEMENT OF CASE

Flight No. 1 of Western Air Lines took off from the Salt Lake City airport at about 1:05 a. m., December 15, 1942, destined to Burbank, California, with a scheduled stop at Las Vegas. The flight plan called for a cruising altitude of 10,000 feet to Enterprise, Utah. At about 1:22 a. m., approximately three miles southeast of Fairfield, Utah, the airplane met with an accident and crashed to the ground, resulting in the death of thirteen passengers and four crew members. The plane was completely demolished.

These actions were brought to recover damages for the wrongful death of three of the passengers for hire, to-wit, Jack Raymond Bratt, a business man, who was 35 years of age, and left surviving his widow and two minor children, Lt. Hugh E. McRae, 21 years of age, who left his mother as his surviving beneficiary, and Leona N. Rosell, 40 years of age, who left her husband as surviving beneficiary.

The airplane was a Douglas DC-3 and with the exception of a few months when it was leased to Eastern Air Lines (137), it was at all times material in the custody and control of the respondent with respect to its ownership, inspection, maintenance, and operation. The operating statistics of this respondent and other carriers (132, 133) demonstrate that if the proper degree of care is exercised by those having the ownership, maintenance, inspection and control of modern aircraft in commercial flight, accidents of this kind ordinarily do not happen.

The evidence presented by respondent indicated that if an airplane is in good working order and condition and is properly managed and controlled and properly loaded and weather conditions are normal for flying, it would not get out of control and crash to the ground (232).

A determined search and inquiry failed to disclose the presence of any other aircraft in the immediate vicinity of the accident at the time (346). There was no evidence in the wreckage of any contact or collision with any plane or object in the air (346).

It appeared without dispute that the left wing tip and right horizontal stabilizer failed in the air, and that the plane was in the process of disintegrating before reaching the ground. Pieces of fabric and glass were found a distance of from 1,500 to 2,000 feet from where the plane came to earth (265). Counsel for respondent conceded that the fractures or failures in the left wing tip and in the right horizontal stabilizer occurred in the air (390).

Weather conditions were not only normal but were ideal for flight. The night was described as clear and smooth and beautiful (39, 42). For several days both before and after the accident there was a stable air mass in an area covering hundreds of miles around Fairfield (170). Respondent's records showed this stable air mass on the trip weather forecast (169). The entire picture indicated light and gentle winds and stable air conditions (170, 171). The government weather records, not merely the forecast, were all to the same effect (29-33).

It appeared without dispute and was formally admitted that respondent not only owned the aircraft but that at the time of and immediately prior to the accident it was in the possession and custody of its employees (27). Further, that the deceased passengers were all passengers for hire and that at the time of and before the accident none of them exercised any control or dominion over the plane (28). It was further admitted that after the acci-

dent the wreckage was inspected and examined at the scene by officials and employees of the respondent (28), and was delivered to the respondent by the C. A. A. about two weeks after the crash (29).

Upon the trial of this case petitioners predicated their right to recover solely and exclusively upon the doctrine of res ipsa loquitur. It may further be stated that respondent did not attempt at any time to establish any one particular cause for the accident, and merely suggested a variety of circumstances that might have some causative effect in its occurrence (389-427).

THE JURISDICTION OF THE UNITED STATES SUPREME COURT

The jurisdiction of this Court to review the decision of the United States Court of Appeals, Tenth Circuit, is invoked pursuant to Title 28, United States Code, Section 1254, effective September 1, 1948.

THE QUESTIONS PRESENTED

The principal questions presented by this application are as follows:

1. Whether in an action to recover for the injury or death of a passenger on a commercial plane in scheduled flight the doctrine of res ipsa loquitur applies in a case where the cause of the crash has not been established.

2. Whether in such a case a presumption of due care on the part of the deceased pilot destroys the inference of negligence under res ipsa loquitur.

These questions were decided adversely to the petitioners by the United States Court of Appeals, Tenth Circuit.

II.

REASONS RELIED ON FOR ALLOWANCE OF THE WRIT

A. The decision here is contrary to and in conflict with the rule of law established by the United States Supreme Court in the case of *Gleeson v. Virginia Midland Railway Co.*, 140 U. S. 435, 11 S. Ct. 859, and by the United States Court of Appeals, Ninth Circuit, in *Smith v. Pacific Alaska Airways, Inc.*, 89 F. (2d) 253.

B. The United States Court of Appeals, Tenth Circuit, by its decision here has decided an important question of law in conflict with applicable local decisions of the Supreme Court of the state of Utah. *Deardon v. San Pedro, L. A. & S. L. R. Co.*, 33 Utah 147, 93 Pac. 271; *Loos v. Mountain Fuel Supply Co.*, 99 Utah 496, 108 Pac. (2d) 254.

C. The United States Court of Appeals, Tenth Circuit, by its decision here has decided an important question of law in conflict with applicable decisions of various state and federal tribunals. *Gleeson v. Virginia Midland Railway Co.*, 140 U. S. 435, 11 S. Ct. 859; *Smith v. O'Donnell*, 215 Cal. 714, 12 Pac. (2d) 933; *McCusker v. Curtiss-Wright, Inc.*, 264 Ill. App. 502; *English v. Miller* (Tex. Civ. App.), 43 S. W. (2d) 642; *Genero v. Ewing*, 178 Wash. 78, 28 Pac. (2d) 116; *Bowser v. Baltimore & Ohio R. Co.* (3 Cir.), 152 F. (2d) 436; *Mikolajczyk v. Allcutt* (3 Cir.), 102 F. (2d) 82; *Waite, et al. v. Pacific Gas & Electric Co.*, 56 Cal. App. (2d) 191, 132 Pac. (2d) 311; *Moeller v. Market Street Ry. Co.*, 27 Cal. App. (2d) 562, 81 Pac. (2d) 475; *Smith v. Hollander*, 85 Cal. App. 535, 259 Pac. 958.

PRAYER

Wherefore, your petitioners pray that a writ of certiorari be issued out of and under the seal of this Court, directed to the United States Court of Appeals, Tenth Circuit, commanding said court to certify and send to this Court the transcript of record in the case entitled, "Hilda Ogden Bratt; Barbara Ann Bratt, a Minor, by her guardian ad litem, Hilda Ogden Bratt; Joan Nancy Bratt, a Minor, by her guardian ad litem, Hilda Ogden Bratt, Appellants, vs. Western Air Lines, Inc., a Corporation, Appellee, No. 3556," including also the proceedings in the trial court together with the denial of petitioners' request for reversal by the United States Court of Appeals, Tenth Circuit, to the end that said cause may be reviewed and determined by this Court and the judgment of the lower courts be reversed.

HILDA OGDEN BRATT; BARBARA ANN BRATT, a minor, etc.; JOAN NANCY BRATT, a minor, etc., Petitioners,

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BRIEF IN SUPPORT OF PETITION FOR CERTIORARI

STATEMENT OF CASE

The facts with reference to the origin and history of the case and also with reference to jurisdiction have been sufficiently covered in the petition, and in the interests of brevity will not be repeated here. The issues and evidence have likewise been discussed in the preceding petition so that the detailed picture need not be repeated. It might be well, however, to view in a little more detail the question of the trial court's charge concerning the doctrine of res ipsa loquitur.

The petitioners in this case relied squarely and solely on the doctrine of res ipsa loquitur. The trial judge advised the jury that the manner of control and operation of the airplane was embraced within the rule of res ipsa loquitur (458, 459). After thus advising the jury that it was permissible for them to infer negligence with respect to the operation of the plane, the court then categorically instructed the jury that they could not infer or presume negligence but must, on the contrary, presume that the deceased pilot had exercised ordinary care (481). The Circuit Court of Appeals of the Tenth Circuit frankly admitted that the instruction was clearly erroneous but contended that it was harmless (490).

Specifications of Errors to Be Urged.

The trial court and the United States Court of Appeals for the Tenth Circuit erred:

1. In holding that an instruction to the jury as a matter of law that the respondent's pilot was presumed to have exercised reasonable care was not prejudicial error.

2. In holding that the doctrine of res ipsa loquitur was properly presented to the jury.

3. In holding for all effectual purposes that the doctrine of res ipsa loquitur had no application to airplane accidents.

ARGUMENT

I.

The United States Court of Appeals, Tenth Circuit, and the Trial Court Erred in Permitting an Instruction to the Jury, as a Matter of Law, That the Respondent's Pilot Was Presumed to Have Exercised Reasonable Care.

The action of the trial court in instructing the jury that there was a presumption that the respondent's employees, who were killed in the crash, and were not parties to the action, exercised reasonable care constituted reversible error in that it completely destroyed any inference of negligence that might have arisen under the doctrine of res ipsa loquitur. It rendered the entire charge on this question inherently conflicting and self-contradictory.

The trial court instructed the jury that there was a presumption the deceased pilot exercised reasonable care for his own concern and that negligence may not be inferred or presumed against it (481). The instruction is inconsistent with that portion of the court's charge wherein he advised the jury that the manner of operation of the airplane was embraced within the rule of res ipsa loquitur (459). It was duly excepted to by petitioners' counsel (481).

It is the position of petitioners that the presumption of due care existing in an action for wrongful death is available only to negative contributory negligence on the

part of the deceased and not to supply or negative evidence of negligence of the tortfeasor. Particularly is this true in a case where the plaintiff relies on the doctrine of res ipsa loquitur. In such a case an instruction by the court that defendant's employees are presumed to have exercised due care counter-balances any charge as to the inference arising under the doctrine of res ipsa loquitur. The court in effect allowed the jury to draw an inference of negligence in one portion of its charge, and thereafter in the same series of instructions advised the jury that it was prohibited from drawing such inference. Solemnly to advise the jury that they might infer negligence on behalf of the petitioners, but that they were required to presume no negligence on behalf of the respondent, would be confusing to say the least. In plain language, and from the standpoint of a layman, the court might as well have said: "In this case you may infer that there was negligence but you must presume that there was no negligence."

The court instructed the jury, and properly so, that respondent as a common carrier of passengers for hire owed the duty of exercising the greatest and highest degree of care consistent with the practical management of its business. The vice of the erroneous instruction becomes more clearly apparent in view of the doctrine applicable to common carriers. It was not a question of whether the deceased pilots exercised ordinary care for their own safety. It was a question of whether they exercised the greatest and highest degree of care for the safety of their passengers, and the instruction was, therefore, entirely inconsistent with the measure of care here owed by respondent to its deceased passengers.

The duty of care here involved is that of the greatest and highest known to the law. It is not simply ordinary care. To indulge a presumption in favor of the deceased pilots expressed in terms of ordinary care negates pri-

mary and controlling principles of law upon which the case was submitted.

The action of the trial court as detailed above and the sustaining of his action by the United States Court of Appeals, Tenth Circuit, is in direct conflict with the language of this Court in the landmark decision of *Gleeson v. Virginia Midland Railway Co.*, 140 U. S. 435, 11 S. Ct. 859, wherein this Court in laying down the proper passenger and carrier rule said:

> "The law is that the plaintiff must show negligence in the defendant. This is done prima facie by showing, if the plaintiff be a passenger, that the accident occurred. If that accident was in fact the result of causes beyond the defendant's responsibility, or of the act of God, it is still nonetheless true that the plaintiff has made out his prima facie case. When he proves the occurrence of the accident the defendant must answer that case from all the circumstances of exculpation, whether disclosed by the one party or the other. They are its matter of defense, and it is for the jury to say, in the light of all the testimony, and under the instructions of the court, whether the relation of cause and effect did exist, as claimed by the defense, between the accident and the alleged exonerating circumstances. *But when the court refuses to so frame the instructions as to present the rule with respect to the prima facie case, and so refuses on either of the grounds by which the refusal is sought to be supported herein, it leaves the jury without instructions to which they are entitled to aid them in determining what were the facts and causes of the accident, and how far those facts were or were not within the control of the defendant. This is error.*" (Italics ours.)

Another case in point on this issue is that of *Bowser v. Baltimore & Ohio R. Co.* (3 Cir.), 152 F. (2d) 436. In this case the widow of Harry Bowser brought suit alleging her husband was killed when two engines collided. During the trial which resulted in a directed verdict for the

defendant it appeared that a fireman and brakeman working for the defendant railroad were also killed in the same collision. The trial court held that the railroad was entitled to a presumption that the said fireman and brakeman exercised due care. In reversing the trial court the United States Court of Appeals, Third Circuit, held:

> "In an action against a railroad for the death of an engineer fatally injured in a collision between engines, the presumption that a fireman and brakeman, who were killed in the same collision, exercised due care, was not available to the railroad."

It is fundamental that a presumption of due care is indulged in only to relieve a plaintiff from an inference of contributory negligence and never to supply evidence of the negligence of a defendant. See *Atchison, Topeka & Santa Fe R. Co. v. Toops,* 281 U. S. 351, 50 S. Ct. 281; *Hatzakorzian v. Rucker-Fuller Desk Co.,* 197 Cal. 82, 239 Pac. 709; *Packard v. O'Neil,* 45 Idaho 427, 262 Pac. 881; *Frederickson v. Iowa C. R. Co.,* 156 Iowa 26, 135 N. W. 12; *Dougherty v. Garrick,* 184 Minn. 436, 239 N. W. 153; *Tresise v. Ashdown,* 118 Ohio St. 307, 160 N. E. 894; *Lamp v. Penn. R. Co.,* 304 Pa. 520, 158 Atl. 269; *Devine v. Brunswick-Balke Collender Co.,* 270 Ill. 504, 110 N. E. 780; *State v. Busby,* 102 Utah 416, 131 Pac. (2d) 510.

In *Mikolajczyk v. Allcutt* (3 Cir.), 102 F. (2d) 82, it was held that:

> "A presumption that the deceased exercised due care arises only when necessary to rebut an inference of contributory negligence of the deceased."

In the case of *Waite, et al., v. Pacific Gas & Electric Co.,* 56 Cal. App. (2d) 191, 132 Pac. (2d) 311, the California court said:

> "* * * The law appears to be well settled that instructions embodying the presumption of due care are improper in a case where the rule of res ipsa loquitur applies."

The court went on further to say:

> "The application of the doctrine of res ipsa loquitur raises an inference of negligence against defendant. It would be contradictory for the court also to instruct the jury that there is a presumption the defendant acted with due care."

In *Moeller v. Market Street Ry. Co.*, 27 Cal. App. (2d) 562, 81 Pac. (2d) 475, the California court said:

> "An instruction that the law presumes that the carmen used the requisite care and acted as reasonable persons was properly refused as the doctrine of res ipsa loquitur raised an inference of negligence."

See also *Smith v. Hollander*, 85 Cal. App. 535, 259 Pac. 958, and *Maki v. Murray Hospital*, 91 Mont. 251, 7 Pac. (2d) 228.

II.

The Correction of the Errors Committed Below Will Afford This Court Opportunity to Establish the Sound Principles for Future Guidance in a New and Important Field of Federal Law.

The field of aviation is new and litigation with reference thereto is bound to be extensive. The question of whether or not the doctrine of res ipsa loquitur applies, and if so, in what manner it applies, is one of great public importance.

With the relationship between air companies and the public increasing daily the question of whether or not the doctrine of res ipsa loquitur shall properly be applied to suits arising out of airplane accidents is one of urgent and outstanding importance to the American public. When one considers the many divergent and conflicting decisions handed down on this question by the supreme courts of the several states and by some federal courts, it becomes apparent that it is time for the United States

Supreme Court to lay down a uniform rule to be followed.

For example, it has been held in the following cases that the rule of res ipsa loquitur is applicable to airplane accidents: *Smith v. Pacific Alaska Airways, Inc.,* 89 F. (2d) 253; *Seaman v. Curtiss Flying Service, Inc.,* 247 N. Y. S. 251, 231 App. Div. 867; *Smith v. O'Donnell,* 215 Cal. 714, 5 Pac. (2d) 690, 12 Pac. (2d) 933; *McCusker v. Curtiss-Wright, Inc.,* 264 Ill. App. 502; *English v. Miller* (Tex. Civ. App.), 43 S. W. (2d) 642; *Bramen-Johnson Flying Service, Inc., v. Thomson,* 167 Misc. 167, 3 N. Y. S. (2d) 602; *Genero v. Ewing,* 178 Wash. 78, 28 Pac. (2d) 116; *Fosbroke-Hobbes v. Air Work, Ltd., and British American Air Service, Ltd.,* 1938 U. S. Av. R. 194 (High Ct. of Justice, King's Bench Division, Dec. 21, 1936) (53 T. L. R. 254, 81 Sol. J. 80); *Malone, et al., v. Trans-Canada Airlines,* 1942 U. S. Av. R. 144 (Dominion of Canada, Province of Ontario, Court of Appeals) (3 D. L. R. 369—1942) (Robertson, C. J. C., Middletown & Henderson G. A.).

Contrariwise, it may be noted that various courts have held that the doctrine of res ipsa loquitur is not applicable in airplane accident cases under varying circumstances: *Morrison v. LeTourneau Co.,* 138 F. (2d) 339; *Cohn v. United Airlines, Inc.,* 17 F. Supp. 865; *Herndon v. Gregory,* 190 Ark. 702, 81 S. W. (2d) 849; *Budgett v. Soo Sky Ways, Inc.,* 64 S. D. 243, 266 N. W. 253; *Wilson v. Colonial Air Transport,* 278 Mass. 420, 180 N. E. 212; *Boulineaux v. City of Knoxville, et al.,* 20 Tenn. App. 404, 99 S. W. (2d) 557.

It must further be admitted that travel by plane must now be regarded as a common means of travel, extensively used, not only throughout North America, but all over the entire world. With experienced and careful pilots and proper equipment, the passenger has the same right to expect that he will be carried safely to his destination as if he had chosen some other means of transportation.

CONCLUSION

It is respectfully submitted that the question here involved is not a mere passing element of local interest but one vital to the interest of the public and of commercial airlines. It must be determined to what extent the doctrine of res ipsa loquitur applies. The rights to be decided here are important and basic. For the reasons heretofore advanced and upon the authorities discussed in this brief, it is respectfully submitted that the petitioners are entitled to have their case submitted to this Court for a decision upon correct principles of law.

Respectfully submitted,

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SUBJECT INDEX

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OCTOBER TERM, 1948.

No. 368

HILDA OGDEN BRATT, BARBARA ANN BRATT, a Minor, by Her Guardian *Ad Litem*, Hilda Ogden Bratt, JOAN NANCY BRATT, a Minor, by Her Guardian *Ad Litem*, Hilda Ogden Bratt,

Petitioners,

vs.

WESTERN AIR LINES, INC., a Corporation,

Respondent.

Brief in Opposition to Petition for Writ of Certiorari in Case of Bratt v. Western Air Lines, Inc.

I.
Statement of Case.

The issues involved in the case before the court (and of the kindred cases which by stipulation abide the rule of this case) have been twice tried, and twice the jury has returned its verdict in favor of the defendant Air Lines. Upon the first occasion an appeal was successfully prosecuted by plaintiff because of technical errors in the rejection of certain offered evidence. On the second trial,

plaintiffs have unsuccessfully appealed it to the United States Court of Appeal for the 10th Circuit (see *Bratt, et al., v. Western Air Lines, Inc.*, 155 F. 2d 850; *Bratt, et al., v. Western Air Lines, Inc.*, 169 F. 2d 214).

There are some inaccuracies in the "Summary Statement Of Matter Involved" in the petition, but they are probably immaterial to the determination of the issue on this petition, for this court will find that they are all considered and put aside by the very apt and concise discussion of the facts, and the law in the decision by Phillips, Circuit Judge, who delivered the opinion for the 10th Circuit.

The first question presented in the petition at page 5 thereof seems to leave the impression that this case was not submitted to the jury on the doctrine of *res ipsa loquitur*. However, there can be no question of the fact that, as stated by the Circuit Court, the plaintiffs relied *wholly* on the *inference* of negligence under that doctrine, and with reference thereto, the trial court properly instructed the jury.

The second question, at page 5 of the petition, poses the issue of whether or not a deceased employee of a common carrier, who is killed in the accident from which this litigation grows, is entitled to the presumption—the same as every other human being—that he exercised reasonable care for his own concern.

Argument.

Since, as we have pointed out, the only basis upon which this case was submitted to the jury at all, was that plaintiff was entitled to rely upon the doctrine of *res ipsa loquitur*, the second issue raised by the petition becomes immaterial when it is shown that the petitioner themselves removed this issue from the cause. They did this during the final argument which, in turn, was at a time prior to the instruction given by the Court. In other words, if the plaintiffs at trial took the position that Captain Loeffler and his assistants in flying the plane were not negligent, it is inconceivable that petitioners could be injured by an instruction of the Court which did not go beyond the admissions of plaintiff's counsel. This situation is frankly and squarely set out in the opinion wherein the Court quoted from the closing argument as follows:

> "A violent effort was made to convince you folks that we have charged Captain Loeffler with terrible disregard of duty.
>
> "Why, I can picture in my mind those last terrific moments; I can see that plane shooting down out of the air to destruction, to death; I can see that valiant boy in there fighting his heart out. Captain Loeffler went to his death simply because Western Air Lines violated the same duty to him that they violated to everyone else in that plane.
>
> "We do not charge Captain Loeffler with a violation of duty. We do not charge him with stunting. We do not charge him with engaging in activity that was likely to cause death just to gratify any whim or caprice that might have actuated his activity at that time.

"This proof demonstrated that this plane crashed to the ground bringing death to the occupants of that plane because of a structural weakness and failsure—that is brushing all the rest of the cobwebs of this case aside and looking at it as it is. That is what this case it (is), a case of structural failure.

"Now that is the only answer."

Petitioners, at page 11 of the petition, rely on the case of *Gleeson v. Virginia Midland Ry. Co.*, 140 U. S. 435, 11 Sup. Ct. 859, wherein it was stated that it was error for the court to refuse to frame the instructions to present the rule with respect to the *prima facie* case, etc. It is apparent that such case is not in point where the petitioners themselves have "framed the issues" as to the basis upon which negligence was charged, namely, negligence proximately causing the structural failure. It would have been well within the province of the trial court in view of the closing argument on behalf of petitioners at trial, to have told the jury in so many words that petitioners had abandoned the claim that the pilot was negligent, and were basing their cause solely, and alone, upon the proposition that the doctrine of *res ipsa loquitur* related to the structural defect, and *not to the management and control of the airplane by Captain Loeffler*.

The fallacy with petitioner's position is that they assume that the instruction meant, and they have attempted to interpret it to the reviewing courts as meaning, that the jury could infer that *Western Air Lines*, the defendant, exercised reasonable care, and that therefore prejudicial error has been created. Even if plaintiffs had not withdrawn this issue from the jury themselves, by admitting that they did not charge the pilot with negligence, such a

position would not be justified by the instruction. The most that can be said for it was that it instructed upon the usual basis or proposition discussed in the opinion below, that self preservation is the first law of nature, and that a deceased is presumed to have exercised reasonable care *for his own concern.*

As is pointed out in the petition, this would not have been sufficient in any event to have relieved Western Air Lines of liability. The jury was instructed amply that the obligation of the defendant, the common carrier, was to exercise *the highest degree of care.* Therefore, if plaintiff had permitted the issue of the pilot's negligence to remain in the case, an instruction that the *pilot* was presumed to have exercised reasonable care would have fallen far short of the degree of care required of the defendant, and with reference to which the jury was amply instructed To rephrase it, a person who exercises only reasonable care does not exercise the highest degree of care. Therefore, to say that a pilot may be presumed to have exercised reasonable care for his own protection, would not be in conflict with the instruction that under the doctrine of *res ipsa loquitur* the happening of the accident raises the inference that the defendant air lines *failed to exercise the highest degree of care.*

We believe that one further analysis of the proposition presented indicates that petitioners are merely grasping at straws in the hope that this Honorable Court may give them one more opportunity to present a lost cause. That analysis is as follows:

The degree of care which the pilot employee of the common carrier was required to use was the same as the common carrier itself was required to use, namely, the highest

degree of care. The instruction to the jury to the effect that all human beings who have been killed in an accident such as this are presumed to have exercised reasonable care for their own concerns was not the equivalent of saying that the pilot was to be presumed to have exercised the highest degree of care for his own concerns. Therefore, had the issue not been withdrawn from the jury by counsel's bold statement that they *charged the pilot with no negligence of whatever character,* the issue of whether or not the pilot exercised the *highest degree of care* would have been untouched and open to determination. The charge of counsel for petitioners in the final argument to the jury that the defendant Western Airlines, because of its negligence in maintenance, was responsible for the structural failures and, therefore, should be charged with liability or responsibility for the death of Captain Loeffler, as well as the death of the various passengers, was an issue the fabric of which was manufactured by counsel themselves on behalf of petitioners, and petitioners may not now, we submit, seek the protection of this Court to avoid the responsibility of their own engagements seeking to retry an issue which they withdrew from the jury.

As an example of our position, we might consider what would have been the situation had the trial court submitted a special interrogatory inquiring of the jury: "Do you find that the pilot, Captain Loeffler, was negligent in his conduct in the management and flying of the airplane?" Presuming the jury answered this in the affirmative, could it be questioned that this would have been error, in view of the unlimited withdrawal from the jury of any such issue?

The petition sets out numerous cases which it is claimed are in conflict with the decision of the Honorable Circuit

Court of Appeals below. It would serve no purpose, we think, to analyze these various cases from which small excerpts have been taken. We have reviewed them. We find that they are not in conflict with the decision of the Circuit Court of Appeals in any respect. That Court, having given due consideration to all of the law, and having concluded that if there was error it could not have been prejudicial, in view of the position taken by petitioners themselves.

Conclusion.

It would seem apparent that since the case was submitted, not to one jury, *but to two juries,* upon the doctrine of *res ipsa loquitur,* and *since petitioners themselves told the jury that the pilot was free from negligence,* the court's instruction to the jury that they, the jury, might infer the very thing which petitioners had already admitted, could not possibly be prejudicial.

We submit that the attempt to have this Court review the decision below upon the theory that the application of the doctrine of *res ipsa loquitur* should be made more certain is without foundation. We make our statement upon the record which shows that in each appeal the Tenth Circuit Court has placed its decision squarely upon the proposition that it was proper to submit the issues to the jury upon the doctrine of *res ipsa loquitur.*

In any event, there is no justification, in the light of the Opinion itself, upon which to predicate the claim that there is a conflict between the decisions of the various Circuit Courts of Appeals; the alleged conflict comes only if it should be assumed that the instruction of the trial court was at variance with the position of plaintiffs below

on the vital issue there involved. As Circuit Judge Phillips so ably pointed out, all claim of such conflict disappears, when faced with the statement of counsel in argument, withdrawing from the jury the very issue with reference to which claim of conflict is made.

For the same reason, likewise, there is no question of great importance involved in the appeal as it stands, and therefore no basis for that reason why this Court should spend its valuable time in considering issues which are of no great importance and which exist only if the Petition should be read without checking it against the decision of the 10th Circuit Court. To accept the proposition that issues such as here presented should as a matter of principal be reviewed by this Court would mean that the Court would be swamped by the tremendous task of reviewing almost every decision of the various Circuit Courts of Appeals. There is no merit to justify favorable consideration of the Petition for Writ of Certiorari.

It is therefore respectfully submitted that the Petition for a writ of Certiorari to the United States Court of Appeals, 10th Circuit, should be denied.

Respectfully submitted,

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